

ESTTA Tracking number: **ESTTA292073**

Filing date: **06/26/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050284
Party	Plaintiff CHERUBS - The Association of Congenital Diaphragmatic Hernia Research, Advocacy and Support
Correspondence Address	William S. Fultz Parker Poe Adams & Bernstein LLP 150 Fayetteville Street, Suite 1400, P.O. Box 389 Raleigh, NC 27602-0389 UNITED STATES trademarks@parkerpoe.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Christopher M. Thomas
Filer's e-mail	christhomas@parkerpoe.com
Signature	/Christopher M. Thomas/
Date	06/26/2009
Attachments	Consent Motion for Leave to File Second Amended Petition for Cancellation.pdf (4 pages)(129521 bytes) Exhibit A-Second Amended Petition for Cancellation.pdf (25 pages)(1203154 bytes) Exhibit B-Consent Email.pdf (3 pages)(63883 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

CHERUBS – The Association of Congenital
Diaphragmatic Hernia Research, Advocacy
and Support,

Petitioner,

v.

Breath of Hope, Incorporated,

Respondent.

Cancellation No. 92050284

**CONSENT MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION FOR
CANCELLATION**

Pursuant to Trademark Rule 2.116(a), 37 CFR § 2.116, and Rule 15 of the Federal Rules of Civil Procedure, Petitioner Cherubs - The Association of Congenital Diaphragmatic Hernia Research, Advocacy and Support (“Petitioner”) files this Motion for Leave to File Second Amended Petition for Cancellation¹ (the “Motion”), which has been consented to in writing by Breath of Hope, Inc. (“Registrant”). If the Board grants this Motion, Petitioner requests that the Board deem as filed the proposed Second Amended Petition for Cancellation, which is attached hereto as Exhibit A. In support of its Motion, Petitioner shows the Board as follows:

BACKGROUND

Petitioner, proceeding *pro se*, filed its original Petition for Cancellation in this matter on December 4, 2008. On January 12, 2009, Registrant, proceeding *pro se*, filed its Answer to the Petition for Cancellation. On March 3, 2009, Petitioner filed an Amended Petition for

¹ Pursuant to TBMP § 502.02(b), the required brief is embodied herein.

Cancellation pursuant to an order of the Board mailed February 12, 2009. Registrant filed its Answer to the Amended Petition to Cancel on March 6, 2009.

On April 13, 2009, undersigned counsel filed a Notice of Appearance entering their appearance as counsel of record for Petitioner in this proceeding. On May 29, 2009 Scott Zarin of Zarin & Associates, P.C. filed a Notice of Appearance entering his appearance as counsel of record for Registrant in this proceeding. Counsel for Registrant has consented to this Motion which, if granted, will result in Registrant being able to file an answer to the Second Amended Petition for Cancellation. (Attached as Exhibit B hereto is a series of emails between William Cannon, counsel for Petitioner and Scott Zarin, counsel for Registrant, in which Mr. Zarin consents to Petitioner amending its petition).

APPLICABLE LAW

A party may amend its pleading with the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15(a). Leave must be freely given when justice so requires. *Id.* In light of this principle, "[t]he Board liberally grants leave to amend pleadings at any stage of the proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party . . ." TBMP § 507.02.

This Motion should be granted since Registrant has consented in writing to Petitioner's amending its Petition for Cancellation. *See* Fed. R. Civ. P. 15(a). Moreover, Registrant will not be prejudiced by the entry of the proposed Second Amended Petition for Cancellation because discovery is still in its early stages. Indeed, Registrant has consented to this Motion and has indicated that it would like to have the opportunity to file an amended answer, *see* Ex. B, an opportunity that will result as a matter of course from the filing of Petitioner's Second Amended Petition for Cancellation.

CONCLUSION

Accordingly, the Board should grant Petitioner's Motion since Registrant has provided its written consent and justice so requires.

This the 26th day of June, 2009.

PARKER POE ADAMS & BERNSTEIN LLP

By: /s/ Christopher M. Thomas
Arthur J. DeBaugh
N.C. Bar No. 15831
William S. Fultz
N.C. Bar No. 35009
Christopher M. Thomas
N.C. Bar No. 31834
William B. Cannon
N.C. Bar No. 33849
150 Fayetteville Street, Suite 1400
P.O. Box 389
Raleigh, North Carolina 27602-0389
Telephone: 919-828-0564
Facsimile: 919-834-4564

*Attorneys for Petitioner CHERUBS – The
Association of Congenital Diaphragmatic Hernia
Research, Advocacy and Support*

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and correct copy of the foregoing **MOTION FOR LEAVE TO FILE SECOND AMENDED PETITION FOR CANCELLATION**, including the attached **SECOND AMENDED PETITION FOR CANCELLATION**, in Cancellation No. 92050284 to be served upon Registrant Breath of Hope, Incorporated via e-mail and US mail, addressed as follows:

Scott Zarin, Esq.
Zarin & Associates, P.C.
1790 Broadway, 10th Floor
New York, NY 10019
scottzarin@copyrighttrademarkcounsel.com

This the 26th day of June, 2009.

PARKER POE ADAMS & BERNSTEIN LLP

By: /s/ Christopher M. Thomas
Arthur J. DeBaugh
N.C. Bar No. 15831
William S. Fultz
N.C. Bar No. 35009
Christopher M. Thomas
N.C. Bar No. 31834
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Telephone: 919-828-0564
Facsimile: 919-834-4564

*Attorneys for Petitioner CHERUBS – The
Association of Congenital Diaphragmatic Hernia
Research, Advocacy and Support*

EXHIBIT A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

CHERUBS – The Association of Congenital
Diaphragmatic Hernia Research, Advocacy
and Support,

Petitioner,

v.

Breath of Hope, Incorporated,

Registrant.

Cancellation No. 92050284

SECOND AMENDED PETITION FOR CANCELLATION

Cherubs - The Association of Congenital Diaphragmatic Hernia Research, Advocacy and Support (“Petitioner”) has been and believes it will continue to be damaged by the continued registration of the term CONGENITAL DIAPHRAGMATIC HERNIA AWARENESS (the “Purported Mark”) shown in U.S. Trademark Reg. No. 3,503,325 (the “Registration”) and seeks cancellation of the Registration. The Petition is based on 15 U.S.C. § 1064 and the grounds for the Petition are as follows:

Factual Background

1. Congenital diaphragmatic hernia (“CDH”) is a birth defect involving abnormal development of the diaphragm. CDH affects one out of every 2,500 babies. In the United States alone, 1,600 babies are born with CDH each year. The disease has a mortality rate of 50%. Despite being as common as spina bifida and cystic fibrosis, CDH is significantly less publicized.

2. Petitioner is a 501(c)(3) organization founded in 1995 to support families affected by CDH, raise money for CDH, and increase public awareness of CDH.

3. On information and belief, Breath of Hope, Inc. (“Registrant”) is an organization incorporated under the laws of the Commonwealth of Virginia.

4. On April 1, 2008, Registrant filed an application to register the Purported Mark on the Principal Register in connection with “promoting public awareness of congenital diaphragmatic hernia” and “public advocacy to promote awareness of congenital diaphragmatic hernia” in International Class 35 (the “Services”), claiming a first use in commerce date of July 1, 2007.

5. On July 15, 2008, the United States Patent & Trademark Office (“USPTO”) issued an Office Action (the “Office Action”) in which it refused to register the Purported Mark on the Principal Register. In refusing the registration, the Examining Attorney stated that the Purported Mark: “CONGENITAL DIAPHRAGMATIC HERNIA AWARENESS, is merely descriptive of a feature of the services that provides awareness regarding congenital diaphragmatic hernia. Because the mark is merely descriptive of the services, registration must be refused on the Principal Register pursuant to Section 2(e)(1) of the Trademark Act.” (*See* Office Action for U.S. App. Ser. No. 77436855, dated 15 July 2008, attached hereto as Exhibit 1.)

6. On July 16, 2008, Registrant amended its application to the Supplemental Register.

7. On September 16, 2008, the USPTO issued the Registration on the Supplemental Register.

8. Registrant has harassed Petitioner and others asserting its purported trademark rights in the phrase “congenital diaphragmatic hernia awareness.” For example, Registrant has:

a. contacted Petitioner and threatened to sue it for infringement of the Purported Mark based on Petitioner's use of the phrase "congenital diaphragmatic hernia awareness";

b. contacted online service providers, including Google and Yahoo!, in attempts to have Petitioner's website removed from the listings of such search engines based on claims that Petitioner was infringing Registrant's alleged rights in the Purported Mark through Petitioner's use of the phrase "congenital diaphragmatic hernia awareness"; and

c. contacted the online service providers Cafepress.com and Zazzle.com in attempts to have Petitioner's online stores, which are hosted by such sites, taken down based on Petitioner's use of the phrase "congenital diaphragmatic hernia awareness."

9. As a result of the foregoing, Petitioner is damaged by, and will continued to be damaged by, the continued registration of the Purported Mark.

First Basis for Cancellation – Genericness

10. The Purported Mark is generic.

11. The relevant public, including patients and families of patients suffering from CDH, would understand the Purported Mark to be the common or class name for the Services.

12. The Purported Mark is a phrase that is so highly descriptive that it is incapable of acquiring distinctiveness as a trademark. Members of the relevant public primarily use or understand the Purported Mark to refer to the genus of the Services.

13. As a matter of law, generic terms cannot function as trademarks denoting source, and they are not registrable on either the Principal or Supplemental Register.

14. Since the Purported Mark is generic, its registration creates a roadblock for Petitioner in its quest to raise public awareness of and financial support for CDH patients and their families.

Second Basis for Cancellation – Fraud

15. The application for the Purported Mark, filed with the USPTO on April 1, 2008 included a sworn declaration signed under penalty of perjury by Registrant's CEO/Director, Elizabeth Doyle Propst.

16. Ms. Doyle Propst swore that "to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive." (A copy of Registrant's Application for the Purported Mark is attached hereto as Exhibit 2).

17. Upon information and belief, such statements were false at the time they were made

18. Upon information and belief, Ms. Doyle Propst knew that other persons, firms, corporations and/or associations had the right to use the Purported Mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive.

19. Moreover, Ms. Doyle Propst was a member of Petitioner's organization for many years and was the state representative for Virginia. Ms. Doyle Propst was aware that Petitioner had used phrases such as "Congenital Diaphragmatic Hernia," "CDH Awareness," "awareness of CDH," and similar phrases prior to any use by Registrant of the Purported Mark. Accordingly,

Registrant knew that Petitioner had prior use of the Purported Mark or phrases substantially similar to the Purported Mark and, by failing to disclose these facts to the USPTO, intended to procure a registration to which Registrant was not entitled.

20. The USPTO relied on Registrant's material false statements in allowing the registration of the Purported Mark. The USPTO would not have allowed registration of the Purported Mark absent Registrant's knowingly false statements.

21. For the foregoing reasons, the continued registration of the Purported Mark is damaging and will continue to damage Petitioner.

WHEREFORE, Petitioner prays that said U.S. Trademark Reg. No. 3,503,325 be cancelled and that this Petition for Cancellation be sustained in favor of Petitioner because: (1) the phrase "Congenital Diaphragmatic Hernia Awareness" is generic; and (2) the purported mark CONGENITAL DIAPHRAGMATIC HERNIA AWARENESS was obtained as the result of fraudulent representations to the USPTO.

This the 26th day of June, 2009.

PARKER POE ADAMS & BERNSTEIN LLP

By: /s/Christopher M. Thomas
Arthur J. DeBaugh
N.C. Bar No. 15831
William S. Fultz
N.C. Bar No. 35009
Christopher M. Thomas
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Telephone: 919-828-0564
Facsimile: 919-834-4564

*Attorneys for Petitioner CHERUBS – The
Association of Congenital Diaphragmatic Hernia
Research, Advocacy and Support*

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and correct copy of the foregoing
SECOND AMENDED PETITION FOR CANCELLATION in Cancellation No. 92050284 to be
served upon Counsel for Registrant Breath of Hope, Incorporated via e-mail and US Mail,
addressed as follows:

Scott Zarin, Esq.
Zarin & Associates, P.C.
1790 Broadway, 10th Floor
New York, NY 10019
scottzarin@copyrighttrademarkcounsel.com

This the 26th day of June, 2009.

PARKER POE ADAMS & BERNSTEIN LLP

By: /s/Christopher M. Thomas
Arthur J. DeBaugh
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Facsimile: 919-834-4564

*Attorneys for Petitioner CHERUBS – The
Association of Congenital Diaphragmatic Hernia
Research, Advocacy and Support*

EXHIBIT 1

To: Breath of Hope, Incorporated (elizabeth@breathofhopeinc.com)
Subject: TRADEMARK APPLICATION NO. 77436855 - CONGENITAL DIAPHRAGM - N/A
Sent: 7/15/2008 8:27:56 AM
Sent As: ECOM105@USPTO.GOV
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/436855

MARK: CONGENITAL DIAPHRAGM

77436855

CORRESPONDENT ADDRESS:

ELIZABETH DOYLE-PROPST
BREATH OF HOPE, INC.
PO BOX 6627, 53 FOUR SEASONS DRIVE
CHARLOTTESVILLE, VA 22906

RESPOND TO THIS ACTION:

<http://www.uspto.gov/teas/eTEASpageD.htm>

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Breath of Hope,
Incorporated

**CORRESPONDENT'S
REFERENCE/DOCKET NO:**

N/A

CORRESPONDENT E-MAIL ADDRESS:

elizabeth@breathofhopeinc.com

OFFICE ACTION

TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE.

ISSUE/MAILING DATE: 7/15/2008

TEAS PLUS APPLICANTS MUST SUBMIT DOCUMENTS ELECTRONICALLY OR SUBMIT FEE: TEAS Plus applicants should submit the following documents using the Trademark Electronic Application System (TEAS) at <http://www.uspto.gov/teas/index.html>: (1) written responses to Office actions; (2) preliminary amendments; (3) changes of correspondence address; (4) changes of owner's

address; (5) appointments and revocations of attorney; (6) amendments to allege use; (7) statements of use; (8) requests for extension of time to file a statement of use, and (9) requests to delete a §1(b) basis.

If any of these documents are filed on paper, they must be accompanied by a \$50 per class fee. 37 C.F.R. §§2.6(a)(1)(iv) and 2.23(a)(i). Telephone responses will not incur an additional fee. NOTE: In addition to the above, applicant must also continue to accept correspondence from the Office via e-mail throughout the examination process in order to avoid the additional fee. 37 C.F.R. §2.23(a)(2).

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issue(s) below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62, 2.65(a); TMEP §§711, 718.03.

SECTION 2(E)(1) REFUSAL

Registration is refused because the applied-for mark merely describes a feature of applicant's services. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); *see* TMEP §§1209.01(b), 1209.03 *et seq.*

A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods and/or services. TMEP §1209.01(b); *see In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005); *In re Gyulay*, 820 F.2d 1216, 1217-18, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). Moreover, a mark that identifies a group of users to whom an applicant directs its goods and/or services is also merely descriptive. TMEP §1209.03(i); *see In re Planalytics, Inc.*, 70 USPQ2d 1453, 1454 (TTAB 2004).

The determination of whether a mark is merely descriptive is considered in relation to the identified goods and/or services, not in the abstract. *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (C.C.P.A. 1978); TMEP §1209.01(b); *see, e.g., In re Polo Int'l Inc.*, 51 USPQ2d 1061 (TTAB 1999) (finding DOC in DOC-CONTROL would be understood to refer to the "documents" managed by applicant's software, not "doctor" as shown in dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242 (TTAB 1987) (finding CONCURRENT PC-DOS merely descriptive of "computer programs recorded on disk" where relevant trade used the denomination "concurrent" as a descriptor of a particular type of operating system). "Whether consumers could guess what the product is from consideration of the mark alone is not the test." *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

In the present case, as seen from the recitation of services, the mark, CONGENITAL DIAPHRAGMATIC HERNIA AWARENESS, is merely descriptive of a feature of the services that provides awareness regarding congenital diaphragmatic hernia. Because the mark is merely descriptive of the services, registration must be refused on the Principal Register pursuant to Section 2(e)(1) of the Trademark Act.

The applied-for mark has been refused registration on the Principal Register. Applicant may respond to the refusal by submitting evidence and arguments in support of registration and/or by amending the application to seek registration on the Supplemental Register. *See* 15 U.S.C. §1091; 37 C.F.R. §§2.47, 2.75(a); TMEP §§801.02(b), 816. Amending to the Supplemental Register does not preclude applicant from submitting evidence and arguments against the refusal(s).

Although registration on the Supplemental Register does not afford all the benefits of registration on the

Principal Register, it does provide the following advantages:

- The registrant may use the registration symbol ®;
- The registration is protected against registration of a confusingly similar mark under Trademark Act Section 2(d);
- The registrant may bring suit for infringement in federal court; and
- The registration may serve as the basis for a filing in a foreign country under the Paris Convention and other international agreements.

See 15 U.S.C. §§1052(d), 1091, 1094; TMEP §815.

Applicant must respond to the requirement(s) set forth below.

DRAWING DOES NOT MATCH SPECIMEN

The mark on the specimen disagrees with the mark on the drawing. In this case, the specimen displays the mark as CONGENITAL DIAPHRAGMATIC HERNIA AWARENESS DAY, while the drawing shows the mark as CONGENITAL DIAPHRAGMATIC HERNIA AWARENESS.

The mark on the drawing must be a substantially exact representation of the mark as used on or in connection with the goods and/or services, as shown by the specimen. 37 C.F.R. §2.51(a); TMEP §807.12(a); *see* 37 C.F.R. §2.72(a)(1). However, applicant may not amend the mark on the drawing to conform to the display on the specimen because the essence or character of the mark would be materially altered; in other words, the mark on the specimen creates a different commercial impression from the mark on the drawing. *See* 37 C.F.R. §2.72(a); TMEP §§807.12(a), 807.14 *et seq.*

Therefore, applicant must submit the following:

- (1) A substitute specimen showing use in commerce of the mark on the drawing. *See* TMEP §807.12(a); and
- (2) The following statement, verified with an affidavit or signed declaration under 37 C.F.R. §§2.20, 2.33: **“The substitute specimen was in use in commerce at least as early as the filing date of the application.”** *See* 37 C.F.R. §2.59(a); TMEP §904.05. If submitting a specimen requires an amendment to the dates of use, applicant must also verify the amended dates. 37 C.F.R. §2.71(c); TMEP §904.05.

If applicant cannot satisfy the above requirements, applicant may amend the application from a use in commerce basis under Trademark Act Section 1(a) to an intent to use basis under Section 1(b), for which no specimen is required. *See* TMEP §806.03(c). However, if applicant amends the basis to Section 1(b), registration will not be granted until applicant later amends the application back to use in commerce by filing an acceptable allegation of use with a proper specimen. *See* 15 U.S.C. §1051(c)-(d); 37 C.F.R. §§2.76, 2.88; TMEP §1103.

To amend to Section 1(b), applicant must submit the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §§2.20, 2.33: **“Applicant has had a bona fide intention to use the mark in commerce on or in connection with the goods or services listed in the application as of the**

filing date of the application.” 37 C.F.R. §2.34(a)(2); TMEP §806.01(b); *see* 15 U.S.C. §1051(b); 37 C.F.R. §2.35(b)(1).

GENERAL INFORMATION

The Office records have been searched and there are no similar registered or pending marks that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

There is no required format or form for responding to an Office action. The Office recommends applicants use the Trademark Electronic Application System (TEAS) to respond to Office actions online at <http://www.uspto.gov/teas/index.html>. However, if applicant responds on paper via regular mail, the response should include the title “Response to Office Action” and the following information: (1) the name and law office number of the examining attorney, (2) the serial number and filing date of the application, (3) the mailing date of this Office action, (4) applicant’s name, address, telephone number and e-mail address (if applicable), and (5) the mark. 37 C.F.R. §2.194(b)(1); TMEP §302.03(a).

The response should address each refusal and/or requirement raised in the Office action. If a refusal has issued, applicant can argue against the refusal; i.e., applicant can submit arguments and evidence as to why the refusal should be withdrawn and the mark should register. To respond to requirements, applicant should set forth in writing the required changes or statements and request that the Office enter them into the application record.

The response must be personally signed or the electronic signature manually entered by applicant or someone with legal authority to bind applicant (i.e., a corporate officer of a corporate applicant, the equivalent of an officer for unincorporated organizations or limited liability company applicants, a general partner of a partnership applicant, each applicant for applications with multiple individual applicants). TMEP §§605.02, 712.

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney.

/Karen K. Bush/
Trademark Examining Attorney
Law Office 105
571-272-9136

RESPOND TO THIS ACTION: Applicant should file a response to this Office action online using the form at <http://www.uspto.gov/teas/eTEASpageD.htm>, waiting 48-72 hours if applicant received notification of the Office action via e-mail. For *technical* assistance with the form, please e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned examining attorney. **Do not respond to this Office action by e-mail; the USPTO does not accept e-mailed**

responses.

If responding by paper mail, please include the following information: the application serial number, the mark, the filing date and the name, title/position, telephone number and e-mail address of the person signing the response. Please use the following address: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.

To: Breath of Hope, Incorporated (elizabeth@breathofhopeinc.com)
Subject: TRADEMARK APPLICATION NO. 77436855 - CONGENITAL
DIAPHRAGM - N/A
Sent: 7/15/2008 8:28:01 AM
Sent As: ECOM105@USPTO.GOV
Attachments:

IMPORTANT NOTICE
USPTO OFFICE ACTION HAS ISSUED ON 7/15/2008 FOR
APPLICATION SERIAL NO. 77436855

Please follow the instructions below to continue the prosecution of your application:

VIEW OFFICE ACTION: Click on this link
http://tmportal.uspto.gov/external/portal/tow?DDA=Y&serial_number=77436855&doc_type=OOA&
(or copy and paste this URL into the address field of your browser), or visit
<http://tmportal.uspto.gov/external/portal/tow> and enter the application serial number to access
the Office action.

PLEASE NOTE: The Office action may not be immediately available but will be viewable within 24 hours of this notification.

RESPONSE MAY BE REQUIRED: You should carefully review the Office action to determine (1) if a response is required; (2) how to respond; and (3) the applicable response time period. Your response deadline will be calculated from 7/15/2008.

Do NOT hit "Reply" to this e-mail notification, or otherwise attempt to e-mail your response, as the USPTO does NOT accept e-mailed responses. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System response form at <http://www.uspto.gov/teas/eTEASpageD.htm>.

HELP: For *technical* assistance in accessing the Office action, please e-mail TDR@uspto.gov. Please contact the assigned examining attorney with questions about the Office action.

WARNING

- 1. The USPTO will NOT send a separate e-mail with the Office action attached.**
- 2. Failure to file any required response by the applicable deadline will result in**

the ABANDONMENT of your application.

EXHIBIT 2

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 77436855

Filing Date: 04/01/2008

NOTE: Data fields with the * are mandatory under TEAS Plus. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.

The table below presents the data as entered.

Input Field	Entered
TEAS Plus	YES
MARK INFORMATION	
*MARK	<u>Congenital Diaphragmatic Hernia Awareness</u>
*STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	Congenital Diaphragmatic Hernia Awareness
*MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
*OWNER OF MARK	Breath of Hope, Incorporated
*STREET	PO Box 6627, 53 Four Seasons Drive
*CITY	Charlottesville
*STATE (Required for U.S. applicants)	Virginia
*COUNTRY	United States
*ZIP/POSTAL CODE	

(Required for U.S. applicants only)	22906
PHONE	434-974-9615
EMAIL ADDRESS	elizabeth@breathofhopeinc.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
LEGAL ENTITY INFORMATION	
*TYPE	CORPORATION
* STATE/COUNTRY OF INCORPORATION	Virginia
GOODS AND/OR SERVICES AND BASIS INFORMATION	
*INTERNATIONAL CLASS	035
FIRST USE ANYWHERE DATE	At least as early as 07/01/2007
FIRST USE IN COMMERCE DATE	At least as early as 07/01/2007
*IDENTIFICATION	Promoting public awareness of congenital diaphragmatic hernia
*FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 07/01/2007
FIRST USE IN COMMERCE DATE	At least as early as 07/01/2007
SPECIMEN FILE NAME(S)	
ORIGINAL PDF FILE	spec-124255195-140808778 . Congenital Diaphragmatic Hernia Awareness Logo.pdf
CONVERTED PDF FILE(S) (1 page)	\\TICRS2\EXPORT15\774\368\77436855\xml1\FTK0003.JPG
SPECIMEN DESCRIPTION	Breath of Hope, Inc's Congenital Diaphragmatic Hernia Awareness Ribbon/Campaign - March 31, 2008 was proclaimed as Congenital Diaphragmatic Hernia Awareness Day in 30 US States.
*IDENTIFICATION	Public advocacy to promote awareness of congenital diaphragmatic hernia
*FILING BASIS	SECTION 1(a)

FIRST USE ANYWHERE DATE	At least as early as 07/01/2007
FIRST USE IN COMMERCE DATE	At least as early as 07/01/2007
SPECIMEN FILE NAME(S)	
ORIGINAL PDF FILE	<u>spec-124255195-140808778 . Congenital Diaphragmatic Hernia Awareness Logo.pdf</u>
CONVERTED PDF FILE(S) (1 page)	<u>\\TICRS2\EXPORT15\774\368\77436855\xml1\FTK0003.JPG</u>
SPECIMEN DESCRIPTION	Breath of Hope, Inc's Congenital Diaphragmatic Hernia Awareness Ribbon/Campaign - March 31, 2008 was proclaimed as Congenital Diaphragmatic Hernia Awareness Day in 30 US States.
ADDITIONAL STATEMENTS INFORMATION	
*TRANSLATION (if applicable)	
*TRANSLITERATION (if applicable)	
*CLAIMED PRIOR REGISTRATION (if applicable)	
*CONSENT (NAME/LIKENESS) (if applicable)	
*CONCURRENT USE CLAIM (if applicable)	
DOMESTIC REPRESENTATIVE INFORMATION	
NAME	Elizabeth Doyle-Propst
FIRM NAME	Breath of Hope, Inc.
STREET	PO Box 6627
INTERNAL ADDRESS	53 Four Seasons Drive
CITY	Charlottesville
STATE	Virginia
COUNTRY	United States
ZIP CODE	22906

PHONE	434-974-9615
EMAIL ADDRESS	elizabeth@breathofhopeinc.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
CORRESPONDENCE INFORMATION	
*NAME	Elizabeth Doyle-Propst
FIRM NAME	Breath of Hope, Inc.
*STREET	PO Box 6627, 53 Four Seasons Drive
*CITY	Charlottesville
*STATE (Required for U.S. applicants)	Virginia
*COUNTRY	United States
*ZIP/POSTAL CODE	22906
PHONE	434-974-9615
*EMAIL ADDRESS	elizabeth@breathofhopeinc.com
*AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	275
*TOTAL FEE PAID	275
SIGNATURE INFORMATION	
* SIGNATURE	/Elizabeth Doyle Propst/
* SIGNATORY'S NAME	Elizabeth Doyle Propst
* SIGNATORY'S POSITION	CEO/Director
* DATE SIGNED	04/01/2008

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 77436855

Filing Date: 04/01/2008

To the Commissioner for Trademarks:

MARK: Congenital Diaphragmatic Hernia Awareness (Standard Characters, see mark)
The literal element of the mark consists of Congenital Diaphragmatic Hernia Awareness.
The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Breath of Hope, Incorporated, a corporation of Virginia, having an address of
PO Box 6627, 53 Four Seasons Drive
Charlottesville, Virginia 22906
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended.

For specific filing basis information for each item, you must view the display within the Input Table.

International Class 035: Promoting public awareness of congenital diaphragmatic hernia; Public advocacy to promote awareness of congenital diaphragmatic hernia

Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, or the applicant's predecessor in interest used the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended.

In International Class 035, the mark was first used at least as early as 07/01/2007, and first used in commerce at least as early as 07/01/2007, and is now in use in such commerce. The applicant is submitting one specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Breath of Hope, Inc's Congenital Diaphragmatic Hernia Awareness Ribbon/Campaign - March 31, 2008 was proclaimed as Congenital Diaphragmatic Hernia Awareness Day in 30 US States..

Original PDF file:

spec-124255195-140808778 . Congenital Diaphragmatic Hernia Awareness Logo.pdf

Converted PDF file(s) (1 page)

Specimen File1

The applicant hereby appoints Elizabeth Doyle-Propst of Breath of Hope, Inc.
53 Four Seasons Drive
PO Box 6627
Charlottesville Virginia 22906
United States

as applicant's representative upon whom notice or process in the proceedings affecting the mark may be served.

Correspondence Information: Elizabeth Doyle-Propst
PO Box 6627, 53 Four Seasons Drive
Charlottesville, Virginia 22906
434-974-9615(phone)
elizabeth@breathofhopeinc.com (authorized)

A fee payment in the amount of \$275 has been submitted with the application, representing payment for 1 class(es).

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /Elizabeth Doyle Propst/ Date Signed: 04/01/2008
Signatory's Name: Elizabeth Doyle Propst
Signatory's Position: CEO/Director

RAM Sale Number: 368
RAM Accounting Date: 04/02/2008

Serial Number: 77436855
Internet Transmission Date: Tue Apr 01 15:04:58 EDT 2008
TEAS Stamp: USPTO/FTK-12.4.255.195-20080401150458783
097-77436855-400307d1eed90913b13ffa84d48
a86c1cd-CC-368-20080401140808778549

Congenital Diaphragmatic Hernia Awareness



CONGENITAL DIAPHRAGMATIC HERNIA
AWARENESS DAY™

MARCH 31, 2008

EVERY BREATH THEY TAKE IS OUR BREATH OF HOPE
WWW.BREATHOFHOPEINC.COM

EXHIBIT B

Thomas, Christopher M.

From: Cannon, William B.
Sent: Friday, June 19, 2009 2:10 PM
To: Thomas, Christopher M.
Subject: FW: CHERUB v. Breath of Hope

William Cannon
Associate
Ext. 9037

From: scottzarin@copyrightrademarkcounsel.com
[mailto:scottzarin@copyrightrademarkcounsel.com]
Sent: Friday, June 19, 2009 12:17 PM
To: Cannon, William B.
Subject: RE: CHERUB v. Breath of Hope

Will --

Thanx for agreeing to this discovery extension. Got your VM. My client is not keen on waiting 2 more weeks for an amended petition. She's reluctantly agreed to 1 week. Can you have it filed by 6/26?

Scott

Zarin & Associates P.C.
1790 Broadway, 10th Floor
New York, NY 10019
Tel: (212) 580-3131
Fax: (212) 580-4393

From: scottzarin@copyrightrademarkcounsel.com
[mailto:scottzarin@copyrightrademarkcounsel.com]
Sent: Monday, June 08, 2009 2:29 PM
To: Cannon, William B.
Subject: CHERUB v. Breath of Hope

Will --

As per our discussion, I will stipulate to CHERUBS amending its petition to cancel, which will result in Breath of Hope being able to file a new answer to that petition. And as per our agreement, CHERUBS will file its new petition by June 19, 2009.

Also as we discussed, discovery is scheduled to close on August 1, 2009 and -- in light of the new petition and answer to be filed -- I propose that this date (in addition to all other discovery related dates) be extended for ninety (90) days. Please let me know whether you will stipulate to this extension of dates. Thanx.

Scott

Zarin & Associates P.C.
1790 Broadway, 10th Floor
New York, NY 10019

Tel: (212)580-3131
Fax: (212)580-4393

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